Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

vs.

DEN-MAT, INC., ROBERT L. IBSEN, W. RICHARD GLACE, FRED H. BROCK, AND PROFESSIONAL PRODUCTS CO.,
Respondents.

Brief of Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. herein oppose the Petition for Writ of Certiorari. This consolidated Petition seeks review of the following actions of the Court of Appeals for the Ninth Circuit:

(a) denial of a petition for writ of mandamus, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 76-3628, to review and to vacate:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's discovery Order No. 24;

(3) the District Court's clarification Order No. 28; and

(4) the District Court's discovery scheduling Order No. 29;

(b) dismissal, for lack of jurisdiction under 28 U.S.C. § 1292(a)(1), in Court of Appeals Appeal No. 77-1214, of appeals from:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's trade secret discovery Order No. 21; and

(3) the District Court's discovery Order No. 24;

(c) dismissal, for lack of jurisdiction under 28 U.S.C. § 1292(a)(1), in Court of Appeals Appeal No. 77-1215, of an appeal from the District Court's clarification Order No. 28;

(d) denial of a petition for writ of mandamus, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 77-1539, to review and to vacate, *inter alia*:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's trade secret discovery Order No. 21;

(3) the District Court's discovery Order No. 24;

(4) the District Court's conspiracy severance Order No. 25;

(5) the District Court's Order No. 26, striking certain of counterdefendants' defenses;

(6) the District Court's clarification Order No. 28;

(7) the District Court's discovery scheduling modification Order No. 32;

(8) the District Court's trade secret Order No. 33;

(9) the District Court's "clean up" Order No. 34; and

(10) the District Court's Order No. 41, assessing costs and attorneys' fees against petitioner's attorneys; and

(e) denial of an "emergency" application for writ of mandamus and prohibition, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 77-2547, to review and to vacate the District Court's Order No. 80.

PROCEEDINGS BELOW

I. Proceedings In The District Court.

On October 27, 1976, the District Court, in Order No. 17,[1] severed, for separate trial pursuant to F.R.Civ.P. 42(b), "the question of the validity of the Lee Pharmaceuticals patents in suit". Also on October 27, 1976, the District Court, in Order No. 21, announced its intention "to refer discovery in the field of trade secrets to a special master", and outlined certain procedures to be followed prior to the issuance of an order of reference. In Order No. 24, filed November 1, 1976, the District Court denied, "without prejudice to their renewal at a more appropriate time", petitioner's motions to file document requests directed to respondents Den-Mat, Inc., Glace, and Brock, and a motion to take the deposition of respondent Brock.

On November 4, 1976, petitioner noticed an appeal from the District Court's Order Nos. 17, 21, and 24, pursuant to 28 U.S.C. § 1292(a)(1), contending that such orders "*de facto* deny plaintiff a preliminary injunction" against respondents' alleged misappropriation of trade secrets and trademarks, and against respondents' alleged infringement of petitioner's trademarks and alleged related acts of un-

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[1] In its *Memorandum* filed June 20, 1977, the District Court noted its then-recent decision "that it would be more convenient if every written order was numbered for ease of reference. The court assigned a number to every written order which ruled on the merits of a motion, or which otherwise addressed substantive or procedural issues. No numbers were assigned to minute orders or orders on stipulation or to extend time.

"The first order which was explicitly numbered was 'Order No. 53', filed on April 22, 1977. For the convenience of the parties," the District Court thereafter set "out a listing of the numbers assigned to those orders which were filed before the numbering system was adopted."

That same numbering system, for District Court Orders prior to number 53, is employed herein.

fair competition. An application for a hearing on such a preliminary injunction had been filed by petitioner in the District Court on April 7, 1976. The appeal from the District Court's Order Nos. 17, 21, and 24 was docketed in the Ninth Circuit Court of Appeals as Appeal No. 77-1214.

On November 2, 1976, the District Court, in Order No. 25, severed, pursuant to F.R.Civ.P. 42(b), "the issue of whether or not a conspiracy existed between plaintiff and its attorneys" to procure the patents in suit by fraud upon the United States Patent and Trademark Office, ordered *that* issue "separated from all other issues in this case" for trial "after all other issues have been disposed of", and, "[u]ntil that time, no discovery in this area will be allowed."

In Order No. 26, also filed on November 26, 1976, the District Court struck certain affirmative defenses of the counterdefendants, including petitioner herein.

In response to several motions of petitioner, the District Court filed Order No. 28 on December 1, 1976. In this Order the District Court noted that, in its 18 months of existence, this litigation had "become a gigantic, grotesque monster of procedural strife", "generating some twenty-six file folders of pleadings" with but "little progress toward resolution on the merits", with the result "that some unusual and innovative procedures would have to be brought into play if any meaningful progress was to be made." The District Court then reconsidered, and adhered to, the rulings set out in Order Nos. 17 and 24.

Petitioner noticed an appeal from Order No. 28 on December 2, 1976, pursuant to 28 U.S.C. § 1292(a)(1), contending that this order, too, "*de facto* denies plaintiff a preliminary injunction." This appeal was docketed in the Ninth Circuit Court of Appeals as Appeal No. 77-1215.

On December 1, 1976, the District Court issued discovery scheduling Order No. 29. On December 6, 1976, the District Court, in Order No. 30, denied petitioner's request for a stay of all proceedings pending resolution of Ninth Circuit Appeal No. 77-1214, noting (1) that a stay would not preserve the *status quo*; (2) the inconsistency of a stay with petitioner's demand for a preliminary injunction; (3) the requirement for "discovery which is necessary before a fair hearing on the injunction application could ever be had"; and (4) the District Court's view that

> "the appeal is frivolous and is merely a maneuver on the part of the plaintiff to further delay the progress of the lawsuit. Such a conclusion is implicit in plaintiff's suggestions that a stay might well force defendants to settle because of their inability to further finance the litigation."

On December 10, 1976, the District Court filed discovery schedule modification Order No. 32, and its trade secret discovery Order No. 33. In the latter Order, the District Court adhered to its October 27, 1976 Order No. 17.

On December 13, 1976, petitioner filed a petition for an extraordinary writ in the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1651 and F.R.App.P. 21. Docketed below as Petition No. 76-3628, this petition requested the Court of Appeals, *inter alia*, to review and to vacate the District Court's Order Nos. 17, 21, and 24.

In Order No. 34, filed January 6, 1977, the District Court disposed of certain matters pending as of November 22, 1976.

On January 13, 1977, pursuant to the District Court's Order No. 36, petitioner was allowed "to pursue discovery in order for it to determine what claims of its patents it believes are being infringed by defendants."

In response to a motion filed by respondents on December 23, 1976, the District Court, in Order No. 41, filed February 16, 1977, found that two motions of petitioner, seeking "reconsideration of prior rulings of the court", without compliance with Local Rule 3(k) of the United States District Court for the Central District of California, were "frivolous and warrant sanctions". Accordingly, petitioner's counsel, who are not parties herein, were directed to pay to respondents' counsel, within thirty days, the sum of $1200 "as reimbursement for costs and attorneys' fees expended in opposing such motion"[2].

On March 2, 1977, petitioner herein filed in the Ninth Circuit Court of Appeals a petition for extraordinary writ pursuant to 28 U.S.C. § 1651 and F.R.App.P. 21. Docketed in the court below as Petition No. 77-1539, this petition requested the Court of Appeals, *inter alia*, to review and to vacate the District Court's Order Nos. 17, 21, 24, 25, 26, 28, 32, 33, 34, and 41.

In accordance with its intentions, announced in Order No. 17, and adhered to in Order Nos. 28 and 33, the District Court, in Order No. 59, filed April 25, 1977, appointed a special master to oversee "the entire issue of trade secrets". In response to petitioner's objection to the appointment of a special master for this purpose, Order No. 59 was vacated in Order No. 66, filed May 12, 1977, and petitioner was directed to "furnish this court, in camera, a detailed statement of all trade secrets which it claims are being misappropriated" by respondents. In response to petitioner's motion "to defer operation of Order No. 66 pending clarification at the June 6, 1977 hearing", filed

[2]The propriety of Order No. 41, and its award of $1,200 in sanctions, is presently before the Ninth Circuit Court of Appeals in Appeal No. 77-1984.

May 19, 1977, the District Court, in Order No. 72, filed May 26, 1977, directed petitioner to file "on the record an exact, explicit, specific, detailed, and step-by-step statement of each and every claimed trade secret", and set out in minute detail the form which such "statement" was to take.

On June 2, 1977, petitioner moved to vacate Order No. 72. This motion was denied on its day of filing, in Order No. 75, the District Court finding that its jurisdiction had not been ousted by then-pending Ninth Circuit Appeal Nos. 77-1214 and 77-1215, and further, that

> "this motion has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion."

In Order No. 80, filed June 28, 1977, the District Court noted that

> "[f]or nearly fifteen months the plaintiff has been seeking a preliminary injunction against alleged misappropriation by the defendants of plaintiff's trade secrets. This hearing has not gone forward because the plaintiff has not yet identified what trade secrets it asserts are being misappropriated. In fact, plaintiff has thus far thwarted every effort of the court to obtain it",

and ordered

> "that the information which plaintiff is required to produce under Order No. 72 shall be furnished the court in camera. Order No. 72 shall in all other respects remain unchanged. Plaintiff is already in default in having failed to produce the information requested within the time specified in Order No. 72, but compliance with the order will be accepted by this court provided the information is filed not later than June 30, 1977."

Petitioner's statement of trade secrets was filed *in camera* on June 30, 1977. Order No. 80 also required respondents to

file a statement of their trade practices, similar in detail to that required of petitioner in Order No. 72.

On July 8, 1977, respondents filed a "motion for reconsideration of Order No. 80", contending that their trade practices had twice been revealed to petitioner's counsel pursuant to protective orders in effect in the District Court, in written documents previously produced or forwarded to petitioner's counsel. In Order No. 81, filed July 13, 1977, petitioner was granted one week's time

> "to bring to the court's attention any further information which is needed concerning the defendants' trade practices, and the reasons why plaintiff's statement of trade secrets should not now be released to defendants' counsel with the restricted information status."

Petitioner's response to Order No. 81 resulted in the filing, on August 5, 1977, of the District Court's Order No. 83. Order No. 83 directed petitioner and respondents to submit, by September 2, 1977, all arguments and materials in support of, and in opposition to, respectively, the preliminary injunction sought by petitioner in April 1976.

In response to Order No. 83, petitioner filed a paper on or about August 12, 1977, in which it stated that it was

> "not prepared to proceed and therefore respectfully declines to proceed in the manner defined in Order No. 83, filed August 5, 1977."

In Order No. 84, filed August 16, 1977, the District Court carefully considered, and rejected, the arguments advanced by petitioner in its response to Order No. 83. Order No. 84 concluded:

> "The court expects plaintiff to comply fully with Order No. 83."

On September 2, 1977, respondents served, and on September 6, 1977, they filed, two memoranda, five affidavits, 12 volumes of exhibit-containing appendices, and a motion for summary judgment of dismissal of petitioner's trade secret and trademark infringement/unfair competition claims. Petitioner neither served nor filed any papers in compliance with the mandate of Orders Nos. 83 and 84.

II. Proceedings In The Court Of Appeals.

On March 28, 1977, the Court of Appeals, over the signatures of Circuit Judges Ozell M. Trask and J. Clifford Wallace, issued the following Order in Ninth Circuit Appeal Nos. 77-1214 and 77-1215, and in Ninth Circuit Petition Nos. 76-3628 and 77-1539, "[u]pon due consideration":

> "(a) the petition for writ of mandamus, No. 76-3628 is denied;
>
> "(b) the petition for writ of mandamus, No. 77-1539 is denied;
>
> "(c) the motion for extension of time is treated as a motion to file late response and is granted;
>
> "(d) the motion for stay is denied; and
>
> "(e) appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable."

Also on March 28, 1977, the Clerk of the Court of Appeals addressed a letter to "All Counsel", informing them of the dismissal of appeal Nos. 77-1214 and 77-1215 "for lack of jurisdiction."

On April 4, 1977, Petitioner filed a motion addressed to the court *en banc*, requesting that the March 28, 1977 Order be vacated on the basis that such Order had been issued by "a panel or division consisting solely of two judges."

On April 28, 1977, a Revised Order, which was "Before" Circuit Judges Trask, Wallace, and Herbert Y. C. Choy," albeit unsigned, provided in Ninth Circuit Appeal Nos. 77-1214 and 77-1215 and Petition Nos. 76-3628 and 77-1539:

"On April 4, 1977, Lee Pharmaceuticals filed two emergency motions requesting a suspension of the periods for seeking rehearing and issuance of the mandate and for en banc consideration of the authority of the panel which issued this Court's order of March 28, 1977. Solely to facilitate the proceedings in the district court, the court issues the following order:

"(a) The petition for writ of mandamus, No. 76-3628 is denied;

"(b) The petition for writ of mandamus, No. 77-1539 is denied;

"(c) The motion for extension of time is treated as a motion to file late response and is granted;

"(d) The motion for stay is denied;

"(e) Appeal Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable;

"(f) The emergency motion addressed to the court en banc shall be treated as a suggestion for hearing en banc and shall be circulated to the active bench for a vote; and

"(g) The emergency motion to suspend the periods of time for rehearing and issuance of the mandate is denied and new periods of time pursuant to Rules 40 and 41 Federal Rules of Appellate Procedure shall commence from the date of the entry of this order.

"This order shall in no way be construed as a comment on the merits, or lack thereof, of the arguments set forth in the emergency motion addressed to the court en banc."

On July 7, 1977, the Court of Appeals issued the following unsigned Order in Appeal Nos. 77-1214 and 77-1215 and in Petition Nos. 76-3628 and 77-1539:

"The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied."

On July 11, 1977, the Court of Appeals issued the following unsigned Order in Appeal Nos. 77-1214 and 77-1215:

"Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied."

On July 13, 1977, the Court of Appeals, in an unsigned Order "Before" Circuit Judges Trask, Choy, and Wallace, ruled:

"(a) the motion for extension of time to file petitions for rehearing is granted and the petitions heretofore received are ordered filed;

"(b) the motions to defer consideration of the petitions for rehearing are denied;

"(c) the 'supplementation and petition for rehearing' filed in no. 76-3628 is denied; and

"(d) the 'supplementation and petition for rehearing' filed in no. 77-1539 is denied."

On July 14, 1977, the Court of Appeals, over the signatures of Circuit Judges Trask and J. Blaine Anderson, issued the following Order in Ninth Circuit Petition No. 77-2547:

"Upon due consideration, the petition for writ of mandamus is denied."

PROCEEDINGS IN THIS COURT.

On or about August 17, 1977, Petitioner filed a "Supplement" to its Petition in this case, reproducing in such "Supplement's" appendix, other allegedly infirm, two-judge orders issued by the Ninth Circuit Court of Appeals, and presently before this Court in No. 77-4.

In a related case, No. 77-259, Petitioner herein seeks a second Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. No. 77-259 seeks review of such Court of Appeals' Orders dated July 12 and 26, 1977, in Ninth Circuit Petition No. 77-1969, denying disqualification of the assigned United States District Judge pursuant to 28 U.S.C. § 455(a).

QUESTIONS PRESENTED.

1. Does 28 U.S.C. § 46(d), which provides that "[a] majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum", in accordance with established legal precepts and rules of statutory construction, so modify 28 U.S.C. §§ 46(b) and (c) to permit determinations in civil appeals and petitions for extraordinary writs, exclusive of those emanating from three-judge trial courts or from administrative agency determinations, to be made by only two judges?

2. No matter whether the answer to Question 1 is affirmative or negative, does any paragraph of 28 U.S.C. § 46 permit a party before a Court of Appeals to select, or participate in the selection of, the judges who shall constitute the panel or division assigned to hear and decide his appeal or petition for an extraordinary writ?

STATUTES INVOLVED.

This Petition nominally concerns 28 U.S.C. § 46, which provides:

> **"§ 46. Assignment of judges; divisions; hearings; quorum**
>
> "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and and hear the cases and controversies assigned as the court directs.
>
> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.
>
> "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

STATEMENT OF THE CASE.

The complaint in this extraordinary case, filed July 7, 1975 and naming respondents Den-Mat, Inc. ("Den-Mat"), Ibsen, and Professional Products Co. as defendants, alleged willful infringement of two of petitioner's patents, misappropriation of an unspecified number of petitioner's unidentified trade secrets, and charged such respondents with unidentified acts of unfair competition. Respondent Den-Mat and petitioner compete in the manufacture, sale, and distribution of composite restorative dental materials, *i.e.*, compositions designed for use by dental practitioners in the repair and restoration of living or artificial teeth. Respondent Ibsen, president of Den-Mat, formerly conducted clinical research, without compensation, for petitioner on its developmental products prior to their distribution to dental practitioners. Respondent Professional Products Co. is a distributor of Den-Mat's products.

The presently viable Second Amended Complaint, filed January 15, 1976, joins two of petitioner's former employees, respondents Glace and Brock, as defendants, alleges willful infringement of three of petitioner's patents and of five of its federally registered trademarks, and persists in its allegations of misappropriation of petitioner's trade secrets and unspecified acts of unfair competition.

The remaining counterclaims of Den-Mat and Ibsen, filed April 28, 1976, allege:

(a) petitioner's violation of the Federal Antitrust Laws, particularly 15 U.S.C. §§ 1, 2, 13(a), 13(c), 13(d), 13(e), and 14;

(b) petitioner's violation of the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16600 and 16700 *et seq.*, the California Unfair Practices Act, Cal. Bus. & Prof.

Code §§ 17000 *et seq.*, and other provisions of the California Business and Professions Code;

(c) petitioner's false marking of its products, in violation of 35 U.S.C. §§ 292(a) and (b); and

(d) petitioner's acts of unfair competition and tortious interference with existing and prospective business relationships.

Counterdefendants named in such counterclaims include petitioner, petitioner's president, and the wife of petitioner's president. Co-conspirators named in such counterclaims include, *inter alia*, counsel to petitioner, at least in their roles, as alleged, in the procurement of the patents in suit by fraud upon the United States Patent and Trademark Office, and in filing and prosecuting this extraordinary litigation.

Indicia of the extraordinary nature of this case, to the extent not communicated in the "Proceedings In The District Court", *supra*, include, *inter alia*, the following:

(a) the holding of *18* normally noticed and *ex parte* hearings by the District Court;

(b) the District Court's issuance of *84* orders *before* a trial on the merits;

(c) petitioner's filing of at least *27* motions to compel discovery pursuant to F.R.Civ.P. 37(b);

(d) petitioner's filing of at least *20* motions for protective orders, "deferrals", extensions or enlargements of time, stays, and suspensions of proceedings;

(e) petitioner's filing of no fewer than *four* motions to disqualify the Honorable Jesse W. Curtis, the assigned District Judge, pursuant to 28 U.S.C. § 455(a);

(f) the filing, by petitioner, or by its counsel, *before* a trial on the merits, of *nine* appeals and petitions for extraordinary writs in the Court of Appeals for the Ninth Circuit;

(g) the filing, on behalf of petitioner, of a psychiatrist's affidavit in Ninth Circuit Petition No. 77-1969[3], which purports to attest, *inter alia*, to Judge Curtis' disposition against petitioner and its counsel; and

(h) the assignment, on August 19, 1977, by the Honorable Albert Stephens, Jr., Chief Judge of the United States District Court for the Central District of California, of the Honorable Martin Pence, United States District Judge for the District of Hawaii, "to review the affidavits and averments filed" in the District Court "in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned."

Such extraordinary proceedings are explained by the extraordinary litigation philosophy of plaintiff's trial counsel, as articulated in paragraphs 3-5 of an "Affidavit of Mary Helen Sears In Support of 'Motion For Retraction And Expungement From The Record Of Statements Made By The Court On January 20 [10], 1977 Which Reflect Adversely Upon Counsel For The Plaintiff'" (Appendix, p. A1), filed in the District Court on February 2, 1977.

Such extraordinary litigation philosophy has failed to impress the District Court and the Court of Appeals. In the latter forum, three petitions for extraordinary writs which are subjects of the instant Petition, Nos. 76-3628, 77-1539,

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[3]The affidavit is set out in the Petition for a Writ of Certiorari, No. 77-259, at p. 22a *et seq.*

and 77-2547, were denied, and two appeals, Nos. 77-1214 and 77-1215, were dismissed for lack of jurisdiction.

Seizing, however, upon the Court of Appeals' apparent assignment of two-judge panels or divisions to hear and decide civil appeals and petitions for extraordinary writs, in the absence of disagreement between members of such two-judge courts, petitioner posits a deprivation of its *right* to a hearing before *three* judges, believed by it to be granted by 28 U.S.C. § 46, and demands hearings, *de novo*, before three-judge courts, none of whose members have previously considered petitioner's appeals and petitions.

Examined closely, petitioner's contentions are totally without merit.

ARGUMENT.

A. The Procedures Of The Ninth Circuit Court Of Appeals In Deciding Cases And Controversies Are In Accord With Established Legal Precepts And Rules Of Statutory Construction.

In the absence of contrary knowledge, respondents accept as true, for purposes of the instant Petition for Writ of Certiorari, the procedures of the Ninth Circuit Court of Appeals as set out in the Petition's Appendix B. However, even if true, the such procedures provide petitioner with no grievance under 28 U.S.C. § 46.

Textile Mills Securities Corp. v. *Commissioner*, 314 U.S. 326 (1941), definitely construed former Section 212 of Title 28, United States Code, a predecessor to the present 28 U.S.C. § 46. Former Section 212, deriving from § 117 of the 1911 Judicial Code, provided that:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established". 314 U.S. at 328.

This Court rejected any literal reading of § 117, 314 U.S. at 330, and emphasized that

> "Though the problem of construction is beset with difficulties, the conclusion that *§ 117 provides merely the permissible complement of judges for a circuit court of appeals* results in greater harmony [footnote omitted] than if the language of § 117 is taken too literally." 314 U.S. at 328; emphasis supplied.

Former Section 212 of Title 28, United States Code, also received more than passing notice in *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1946). At issue in

Ayrshire Collieries was the propriety of an order issued by only two judges under the Urgent Deficiencies Act, former Section 47 of Title 28, United States Code.[4] This Court concluded that

> "[w]hen the framers of the Urgent Deficiencies Act declared that these applications 'shall be heard and determined by three judges,' we assume that they meant exactly what they said. . . .
>
> "It is significant that this Act makes no provision for a quorum of less than three judges. *Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases* [footnote omitted]. 28 U.S.C. 212. 28 U.S.C.A. 212. The absence of such a quorum provision as to three-judge district courts is a strong corroborating indication that participation by all three judges is necessary to render a valid decision." 331 U.S. at 137, 138-139; emphasis supplied.

Given the foregoing comparison of procedures to be followed by a Court of Appeals, as opposed to a three-judge district court, coupled with the express "quorum" provision of 28 U.S.C. § 46(d), the conclusion is inescapable that participation by *each* of three circuit judges in the hearing and determination of causes is *not* necessary for the rendition of valid Circuit Court decisions.

The hearing and determination of cases and controversies is the subject of both paragraphs (b) and (c) of 28 U.S.C. § 46. Section 46(b) contains the seemingly mandatory language:

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[4]With respect to the Interstate Commerce Commission, present statutes 28 U.S.C. §§ 2284 and 2325.

> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, *each consisting of three judges.*" (Emphasis supplied.)

Such language, however, is expressly mollified by Section 46(c):

> "(c) Cases and controversies shall be heard and determined by a court or division *of not more than three judges. . . .*"

Petitioner apparently urges your Honorable Court to rewrite, by judicial fiat, 28 U.S.C. § 46(c) to read:

> "(c) Cases and controversies shall be heard and determined by a court or division of not *less* than three judges. . . ."

The statute does not so read. Furthermore, when 28 U.S.C. §§ 46(c) and (d) are read in context, as they must be read, the "majority" and "quorum" language of the latter expressly authorize *two* judges of a Court of Appeals to hear and decide cases and controversies.

Respondents' Question No. 1 must be answered in the affirmative; petitioner's Question No. 1 must be answered in the negative.

B. 28 U.S.C. § 46(c) Is A Grant Of Power To The Courts Of Appeal, Precluding Any Assertion By A Litigant Of A Right To Select, Or To Participate In The Selection Of, The Judges Who Shall Hear And Determine His Cause.

28 U.S.C. § 46(c) was closely analyzed in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953), in which Mr. Chief Justice Vinson framed and responded to the issues as follows:

"What particular right, if any, does it [*i.e.*, 28 U.S.C. § 46(c)] give to a litigant in a Court of Appeals? To what extent is he entitled to put the merits of his cause before each member of the court in pressing his demand for a hearing or a rehearing before the entire court?

"In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. . . . It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." 345 U.S. at 250.

To reach petitioner's second question, your Honorable Court would be required to *rewrite* 28 U.S.C. § 46(c), as noted above, and to *ignore* the express "majority" and "quorum" language of 28 U.S.C. § 46(d). At its core, petitioner's second question asserts an unqualified right of a disappointed Court of Appeals litigant to a second hearing before an entirely different panel or division, or before a Court of Appeals *en banc*. *Western Pacific Railroad, supra*, expressly rejected any such purported right:

> "*Litigants are certainly given no special standing to partake, as of right, in the court's decisions pertaining to the arrangement of its calendar and the assignment of cases to divisions.* Just as *the statute makes no provision binding the court to entertain every request that a particular case be assigned to a particular division*, so it should not be construed to compel the court to entertain, en banc, motions for a hearing or rehearing en banc.
>
> "A contrary reading—one which would sustain petitioners—would obviously require a practice which might

> thrust unwarranted extra burdens on the court. It is difficult to believe that Congress intended to give an automatic, second appeal to each litigant in a Court of Appeals composed of more than three judges. Yet petitioners would have us hold that such a 'horizontal' appeal is implicit in § 46. . . ." 345 U.S. at 258; emphasis supplied.

Question No. 2 of respondents, as well as of petitioner, must be answered in the negative.

CONCLUSION.

For the reasons set forth above, the Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on this 13th day of September, 1977, three copies of the Brief of Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit, were served, in compliance with Supreme Court Rules 33(1) and 33(2)(a), by air mail, postage prepaid, upon counsel to Petitioner, and upon the Solicitor General of the United States, respectively. I further certify that all parties required to be served have been served.

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APPENDIX

PARAGRAPHS 3-5 OF AFFIDAVIT OF MARY HELEN SEARS IN SUPPORT OF "MOTION FOR RETRACTION AND EXPUNGEMENT FROM THE RECORD OF STATEMENTS BY THE COURT ON JANUARY 20, 1977 WHICH REFLECT ADVERSELY UPON COUNSEL FOR THE PLAINTIFF"

3. I am an experienced litigation lawyer, admitted to practice in Virginia and the District of Columbia and before numerous federal courts including seven of the eleven United States Courts of Appeals and the Supreme Court. Since 1961, I have unremittingly spent by far the major proportion of my time in the representative [sic] of clients in patent, trademark and unfair competition litigation and related antitrust matters before a plurality of courts throughout the United States.

4. I have at all times had, and I continue to have, the highest personal respect and regard for the judicial process, for judicial decorum and for the office of judge or justice, and I have at all times endeavored to conduct myself in a manner demonstrative of that respect.

5. I have also at all times understood and believed, and I still understand and believe, that it is the duty and responsibility of counsel in each and every case

(a) to pursue a client's cause, if just, with vigor and to refuse to accede to the correctness of court orders that are inconsistent with established law or with a client's legal and constitutional rights, even while respecting such orders so long as they subsist;

(b) even while respecting legally or factually incorrect orders of courts, to use every available means afforded by applicable rules and statutes for challenging such

incorrect orders including motions for (i) rehearing, (ii) vacation, (iii) clarification, (iv) reconsideration, and (v) revocation to the same court, and appellate remedies, including petitions for extraordinary writs where grounds for such writs appear reasonably to exist;

(c) whenever it appears from the record that a judge has exceeded his legal authority to bring the matter to his attention and if he refuses to correct or modify his apparent excess and cannot produce clear justification based on statute, rule or precedent, to apply to an appellate court for review and correction;

(d) whenever a judge has made fact findings or observations contrary to or unsupported by the record, to call the matter to his attention and seek a correction and, if he refuses correction and fails to point to facts that fully justify his findings, to exhaust in accordance with the rules such appropriate remedies, including appellate remedies, as may be available; and

(e) whenever the record suggests that an assigned judge is not behaving in an impartial, objectively judicial manner to bring the matter to his attention and, if a satisfactory explanation or clarification cannot be obtained, to file a motion for disqualification pursuant to applicable rules and statutes which afford the right to do so, to the end that the client may have a fair and impartial trial of its case.

/s/ MARY HELEN SEARS

Mary Helen Sears

WASHINGTON
DISTRICT OF COLUMBIA } ss

Sworn to and subscribed this 31st day of January, 1977.

(Original Notarized)

Notary Public